Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-845–04 OF 2013
MOHD HISHAMUDIN, ALIZATUL KHAIR AND MAH WENG KWAI JJCA
3 SEPTEMBER 2014

Contract — Agreement — Breach — Parties entered project to construct houses to relocate squatters — State government accepted tender in toto without any qualification or variation — Contract awarded to appellant — Issuance of notice to stop work — Termination of project — Whether termination mutually agreed by parties — Loss of profits — Whether termination lawful — Claim for damages

The State Government of Selangor appointed the respondent to carry out the development of a portion of the project known as Penempatan Semula Setinggan Bukit Botak (Taman Selayang Mutiara) Selangor, ('the project'). In June 2006, the appellant submitted its tender to the respondent for part of the project, namely, to construct and complete 592 units of one storey semi-detached houses including infrastructure works to relocate the squatters at Bukit Botak under Package 1 Bandar Baru Selayang ('the works'). The appellant's tender price was RM41,380,000. The respondent accepted the appellant's tender in toto without any qualification or variation and awarded the contract for the works to the appellant ('the contract'). The period for the construction and completion of the works was 96 weeks. On 10 July 2008 the respondent issued a temporary stop work notice to the appellant to stop all work immediately until further notice. The reason for the notice was due to the respondent's intention to review the project and to determine whether to proceed with it as it was causing huge losses to the respondent. Further notice was given to the appellant after the State Executive Council of Selangor had passed a resolution to terminate all the contracts under the project including the appellant's contract. The final stop work notice was issued to the appellant on 29 August 2008. The appellant was in possession of the site for a period of 21 days only when work was stopped. It was the respondent's case that it had been agreed that the contract between the appellant and respondent would be mutually terminated and that a joint inspection of the site to assess the value of work done would be carried out the next day. However, the appellant denied that it had agreed to a mutual termination of the contract and did not attend the proposed joint inspection. Three years later, the appellant's solicitors issued a letter of demand to the respondent claiming for loss of profits in the sum of RM12,520,000. The appellant denied that it had agreed with the respondent

to have the contract mutually terminated. The appellant averred that the respondent had unilaterally without the consent of the appellant, terminated the contract and as such the termination was wrongful and unlawful. The High Court judge held that the termination of the contract was a mutual termination and that, save for the award of the sum of RM70,575.45 being a sum admitted by the respondent, the rest of the appellant's claim was dismissed with costs. Hence, the present appeal.

Held:

(1) The appellant did not retain any part of the works for its own performance. The value of the contract at RM41,380,000 was not a paltry sum. On the contrary it was a huge contract at a colossal sum and the appellant had obviously been pre-qualified to be a tenderer in the first place. But by having subcontracted the whole of the works to the subcontractor, the appellant was the contractor in name only and can be regarded as a nominee contractor. There was no privity of contract between the respondent and the subcontractor. While it may not have been an assignment in the formal sense, the subcontract surely took on the cloak of an assignment. To the court, it was clear as day that the appellant's role in the contract to enable it to make its profit was to obtain the contract from the respondent on the one hand and then to award the entire scope of works to the subcontractor on the other (see paras 41–42).

(2) The appointment of the subcontractor was not in breach of cl 11 as it was neither 'an assignment, sub-lease nor sale of the Works to a third party'. It was a subcontract notwithstanding that it was a subcontract for the performance of the entire scope of works awarded to the appellant as the contractor (see para 44).

(3) A contract of this magnitude would normally take weeks if not months for any responsible subcontractor to prepare its quotation to the contractor and importantly, to be able to marshal its finances and mobilise its workforce, plant and machinery to commence work. Commencement of work in this case had originally been scheduled for 7 March 2008, which incidentally was a date even before the subcontractor had been appointed on 12 March 2008 (see para 46).

(4) The appellant did not take any steps at the trial to call the relevant witnesses to prove to the trial court that a profit at 30.26 per centum for a contract of this nature was usual or normal to be achieved in the construction industry. The appellant had failed to prove on a balance of probabilities the part of the contracted sum which remained unpaid and the estimated cost of completing the job. No evidence was adduced to prove these sums adequately (see paras 51 & 56).

(5) The appellant had wholly failed to elect to claim for either the loss of profits or for wasted expenditure only. On the contrary, it will be recalled that the thrust of the appellant's claim was not only to claim for the loss of profits but also for the cost of wasted expenditure as well (see para 64).

(6) In the absence of proof of damages by the appellant, RM70,575.45 correctly represents the value of work done by the subcontractor, measured on a quantum meruit basis. As the appellant had failed to elect to claim either for loss of profits or for wasted expenditure only, and the claim being bad for uncertainty in the circumstances, the court awarded the sum of RM100,000 which included RM70,575.45 assessed by DW1, as nominal damages to the appellant. This was on the basis that this court recognises the fact that the appellant did suffer some loss as a result of the wrongful termination (see paras 70–71).

[Bahasa Malaysia summary

Kerajaan Negeri Selangor melantik responden untuk menjalankan sebahagian daripada pembangunan projek yang dikenali sebagai Penempatan Semula Setinggan Bukit Botak (Taman Selayang Mutiara) Selangor, ('projek'). Pada bulan Jun 2006, perayu berhujah tendernya kepada responden untuk sebahagian projek, iaitu, untuk membina dan menyiapkan 592 unit rumah berkembar satu tingkat satu termasuk kerja-kerja infrastruktur untuk penempatan semula setinggan-setinggan di Bukit Botak di bawah Pakej 1 Bandar Baru Selayang ('kerja-kerja'). Harga tender perayu adalah sebanyak RM41,380,000. Responden menerima tender perayu in toto tanpa apa-apa kelayakan atau variasi dan mengawardkan kontrak untuk kerja-kerja kepada perayu ('kontrak'). Tempoh untuk pembinaan dan penyiapan kerja-kerja adalah 96 minggu. Pada 10 Julai 2008 responden mengeluarkan notis berhenti kerja sementara kepada perayu untuk memberhentikan semua kerja serta merta sehingga notis selanjutnya. Alasan untuk notis adalah disebabkan kepada niat responden untuk menyemak semula projek dan untuk menentukan sama ada untuk meneruskan dengannya kerana ia menyebabkan kerugian besar kepada responden. Notis selanjutnya diberikan kepada perayu selepas Majlis Eksekutif Kerajaan Selangor telah meluluskan resolusi untuk menamatkan kesemua kontrak di bawah projek termasuk kontrak perayu. Notis berhenti kerja terakhir dikeluarkan kepada perayu pada 29 Ogos 2008. Perayu dalam milikan kawasan hanya untuk tempoh selama 21 hari apabila kerja diberhentikan. Adalah kes responden bahawa ia telah dipersetujui yang kontrak di antara perayu dan responden akan dengan bersama ditamatkan dan bahawa pemeriksaan bersama kawasan untuk mentaksir nilai kerja yang telah dibuat yang akan dijalankan keesokan harinya. Walau bagaimanapun, perayu menafikan yang ia telah bersetuju kepada penamatan bersama kontrak dan tidak menghadiri pemeriksaan bersama yang dicadangkan. Tiga tahun kemudian, peguamcara perayu mengeluarkan surat menuntut kepada responden menuntut untuk kehilangan keuntungan dalam jumlah sebanyak

RM12,520,000. Perayu menafikan bahawa ia telah bersetuju dengan responden untuk membuat kontrak ditamatkan secara bersama. Perayu berhujah bahawa responden telah secara unilateral tanpa izin perayu, menamatkan kontrak dan dengan itu penamatan adalah salah dan tak sah. Hakim Mahkamah Tinggi memutuskan bahawa penamatan kontrak adalah penamatan bersama dan bahawa, kecuali award yang berjumlah sebanyak RM70,575.45 sebagai jumlah yang diakui oleh responden, kesemua tuntutan perayu ditolak dengan kos. Maka, rayuan ini.

Diputuskan:

(1) Perayu tidak mengekalkan apa-apa bahagian kerja untuk pelaksanaannya sendiri. Nilai kontrak pada RM41,380,000 bukan jumlah remeh. Sebaliknya ia adalah kontrak besar pada jumlah besar dan perayu jelas pada mulanya telah pra layak sebagai penender. Tetapi dengan membuatkan keseluruhan kerja disubkontrakkan kepada subkontraktor, perayu adalah kontraktor dalam nama sahaja dan hanya boleh dikatakan sebagai kontraktor penama sahaja. Terdapat priviti kontrak di antara responden and subkontraktor. Walaupun ia bukan penyerahhakan dalam erti kata yang formal, subkontrak sesungguhnya atas litupan penyerahhakan. Kepada mahkamah, ia adalah jelas bahawa peranan perayu dalam kontrak untuk membolehkan ia membuat keuntungannya adalah untuk mendapatkan kontrak daripada responden di sebelah pihak dan kemudiannya untuk mengaward keseluruhan skop kerja kepada subkontraktor sebelah pihak satu lagi (lihat perenggan 41–42).

(2) Perlantikan subkontraktor bukan dalam kemungkiran klausa 11 kerana ia bukan 'an assignment, sub-lease nor sale of the Works to a third party'. Ia adalah subkontrak walaupun ia adalah subkontrak untuk pelaksanaan keseluruhan skop kerja diawardkan kepada perayu sebagai kontraktor (lihat perenggan 44).

(3) Kontrak sebesar ini akan secara biasa mengambil berminggu-minggu jika tidak berbulan-bulan untuk mana-mana subkontraktor yang bertanggungjawab menyediakan sebut harganya kepada kontraktor dan adalah penting, untuk membolehkan mengatur kewangannya dan menyediakan tenaga kerja, loji dan mesinnya untuk memulakan kerja. Permulaan kerja dalam kes ini telah secara asalnya dijadualkan untuk 7 Mac 2008, yang mana kebetulan adalah tarikh sebelum subkontraktor dilantik pada 12 Mac 2008 (lihat perenggan 46).

(4) Perayu tidak mengambil apa-apa langkah semasa perbicaraan untuk memanggil saksi-saksi relevan untuk membuktikan kepada mahkamah perbicaraan bahawa keuntungan pada 30.26 peratus bagi kontrak yang bersifat ini adalah biasa normal untuk dicapai dalam industri pembinaan. Perayu gagal untuk membuktikan atas imbangan kebarangkalian bahagian jumlah kontrak yang kekal belum dibayar dan kos yang

dianggarkan untuk menyiapkan kerja tersebut. Tiada keterangan dikemukakan untuk membuktikan jumlah ini secara wajar (lihat perenggan 51 & 56).

(5) Perayu telah gagal sepenuhnya untuk memilih untuk menuntut sama ada untuk kehilangan keuntungan atau hanya untuk perbelanjaan sia-sia sahaja. Sebaliknya, ia diingati semula bahawa teras tuntutan perayu bukan hanya untuk menuntut bagi kehilangan keuntungan tetapi juga untuk kos perbelanjaan sia-sia juga (lihat perenggan 64).

(6) Dalam ketiadaan bukti ganti rugi oleh perayu, RM70,575.45 dengan betul mewakili nilai kerja yang dilakukan oleh subkontraktor, diukur atas asas kuantum meruit. Oleh kerana perayu gagal untuk memilih untuk menuntut sama ada untuk kehilangn keuntungan atau perbelanjaan sia-sia sahaja, dan tuntutan sebagai tidak elok kerana ketidakpastian dalam keadaan, mahkamah mengawardkan sejumlah RM100,000 yang mana termasuk RM70,575.45 ditaksir oleh DW1, sebagai ganti rugi nominal kepada perayu. Ini adalah atas asas bahawa mahkamah ini menerima fakta bahawa perayu memang mengalami kerugian akibat penamatan salah (lihat perenggan 70–71).]

Notes

For a case on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697, FC (refd)
Anglia Television Ltd v Reed [1971] 3 All ER 690, CA (refd)
Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan [2004] 1 MLJ 411; [2004] 1 AMR 81, CA (refd)
Beaumont v Greathead (1846) 2 CB 494 (refd)
Feize v Thompson (1808) 1 Taunt 121 (refd)
Guan Soon Tin Mining Co v Ampang Estate Ltd [1973] 1 MLJ 25, FC (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Hadley and another v Baxendale and others (1854) 9 Exch 341; [1843–60] All ER Rep 461 (refd)
Ismail v Haji Taib [1972] 1 MLJ 259, FC (refd)
Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17, CA (refd)
Mostyn v Coles (1862) 7 H & N 872 (refd)
National Land Finance Co-Operative Society Ltd v Westingmont Holdings Sdn Bhd [2014] 1 AMCR 485, CA (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635, HC (refd)
Sapwell v Bass [1910] 2 KB 486, KBD (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd [2012] 2 MLJ 314, CA (refd)
Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd [2011] 1 CLJ 755, HC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 AMR 41, FC (refd)
Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor [2012] MLJU 159; [2012] 5 CLJ 229; [2012] AMEJ 0030, CA (refd)

Legislation referred to

Contracts Act 1950 ss 71, 74

Appeal from: Suit No 21NCVC-112–09 of 2011 (High Court, Shah Alam)

Thakurdas Narindas (Kelvin Ng Chun Yee and Teoh Bi Shan with him) (Vin & Isaac Lee) for the appellant.
Faizal Hassan bin Abdul Hamid (Noor Asnie M Salleh with him) (Edlin Ghazaly & Assoc) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] In 2005, the State Government of Selangor appointed the Perbadanan Kemajuan Negeri Selangor ('PKNS'), the respondent, to carry out the development of a portion of the project known as 'Penempatan Semula Setinggan Bukit Botak (Taman Selayang Mutiara) Selangor', ('the project').

[2] In June 2006, the appellant submitted its tender to the respondent for part of the project, namely, to construct and complete 592 units of one storey semi-detached houses including infrastructure works to relocate the squatters at Bukit Botak under Package 1 Bandar Baru Selayang ('the works').

[3] The appellant's tender price was RM41,380,000. The description and cost of the works may be summarised as follows:

Section	Description	Total Amount (RM)
1	Preliminaries	2,165,000
2	Piling works	2,252,308.46
3	Building works:	
	(A) Substructure works	5,162,697.85
	(B) Superstructure works	15,766,233.04
4	Mechanical and electrical services	

	(a) Sanitary plumbing and cold water services	2,496,800
	(b) Electrical and telephone services	2,764,900
5	Infrastructure work and ancillary building	10,272,060.65
6	Provisional sum	500,000
	Total carried to form of tender	41,380,000

[4] The respondent accepted the appellant's tender in toto without any qualification or variation and awarded the contract for the works to the appellant ('the contract'). The letter of acceptance of tender ('surat setuju terima tender') dated 22 February 2008 was issued to the appellant. It was accepted by the appellant on 28 February 2008 who acknowledged all the terms and conditions contained therein. The lump sum contract price was confirmed at RM41,380,000.

[5] Possession of site was to have been delivered to the appellant on 7 March 2008 but was only delivered on 20 June 2008. The period for the construction and completion of the works was 96 weeks.

[6] On 10 July 2008 the respondent issued a temporary stop work notice to the appellant to stop all work immediately until further notice. The reason for the stop work notice was due to the respondent's intention to review the project and to determine whether to proceed with it as it was causing huge losses to the respondent.

[7] Further notice was given to the appellant after the State Executive Council of Selangor had passed a resolution to terminate all the contracts under the project including the appellant's contract. The final stop work notice was issued to the appellant on 29 August 2008.

[8] The appellant was in possession of the site for a period of 21 days only, that is, from 20 June 2008–10 July 2008 when work was stopped.

[9] On 3 September 2008 a special meeting was held between the appellant and the respondent to discuss the stop work notice. Present at the meeting were representatives of the appellant including Chua Sin Han, a civil engineer and technical advisor ('PW2') and Ler Cheng Koy, a director ('PW4'), and the representatives of the respondent including Mohd Asmadi bin Othman, a quantity serveyor ('DW1') and Ahmad Tarmidzi bin Ahmad Nordin, an engineer and supervisor ('DW2').

[10] It was the respondent's case that it had been agreed at the special meeting that the contract between the appellant and respondent would be mutually terminated and that a joint inspection of the site to assess the value of work done would be carried out the next day, that is, on 4 September 2008 at 10am.

[11] However, the appellant denied that it had agreed to a mutual termination of the contract and did not attend the proposed joint inspection on 4 September 2008.

[12] The minutes of the special meeting held on 3 September 2008, prepared by DW2, were forwarded to the appellant vide a letter dated 22 September 2008.

[13] The purported notice of mutual termination dated 24 September 2008 was then forwarded to the appellant.

[14] The respondent did not respond either to the letter of 22 September 2008 or to the minutes of the special meeting.

[15] Mohd Asmadi bin Othman (DW1), the quantity surveyor of the respondent, proceeded with the estimation of work done during the site inspection on 4 September 2008 and assessed the value of work done at RM70,575.45.

[16] On 19 August 2011, that is some three years later, the appellant's solicitors issued a letter of demand to the respondent claiming for loss of profits in the sum of RM12,520,000.

THE APPELLANT'S AMENDED CLAIM

[17] Upon the appellant's tender being accepted by the respondent on 22 February 2008, the appellant appointed HK Jaya Sdn Bhd ('the subcontractor') on 12 March 2008 as its subcontractor to construct and complete the 'piling, substructure, super structure, mechanical and electrical services and infrastructure works and ancillary building' ('the subcontract works') at a lump sum fixed price of RM28,860,000.

The scope of the subcontract works, with a breakdown of the contract sum, was as follows:

		(RM)
(a)	Preliminaries	2,610,000
(b)	Piling works	2,139,692

	BUILDING WORK	
(c)	Substructure works (Pilecaps and ground beams)	4,617,600
(d)	Superstructure works	10,774,400
	MECHANICAL & ELECTRICAL SERVICES	
(e)	Sanitary plumbing and cold water services	2,022,408
(f)	Electrical and telephone services	2,239,569
(g)	Infrastructure work and ancillary building	4,156,331
(h)	Provisional sum	300,000
	Total:	28,860,000

The period for the completion of the subcontract works was 96 weeks from the date of possession of the site.

[18] The subcontractor entered the site on 20 June 2008 to commence work. Due to the two stop work notices issued by the respondent, the subcontractor stopped its work on 10 July 2008.

[19] The appellant denied that it had agreed with the respondent to have the contract mutually terminated during the special meeting held on 3 September 2008. The appellant averred that the respondent had unilaterally without the consent of the appellant, terminated the contract and as such the termination was wrongful and unlawful.

[20] As a result of the respondent's alleged breach and/or wrongful termination of the contract the appellant had suffered loss and damage.

[21] In para 13 of the amended statement of claim, the appellant claimed for loss of profits in the sum of RM12,520,000. This sum was arrived at by deducting the cost of the subcontract works (RM28,260,000) from the cost of the works (RM41,380,000).

[22] Additionally, the appellant claimed for the sum of RM2,563,878.95 being the expenditure incurred in respect of the works. This was made up as follows:

(a)	Claims by the subcontractor for work done	— RM1,500,000
(b)	Premium for the performance bond	— RM470,000
(c)	Interest on the premium for the performance bond	— RM122,064.60

(d)	Contractors' all risk and workmen's compensation insurance policies	—	RM56,814.35
(e)	Project management costs	—	RM105,000
(f)	Head office charges	—	RM210,000
(g)	General expenses	—	RM50,000
(h)	Costs incurred during tender	—	RM50,000
	Total	—	RM2,563,878.35

[23] In the alternative, the appellant claimed for work done under quantum meruit pursuant to s 71 of the Contracts Act 1950.

[24] The appellant had also claimed for exemplary and aggravated damages in the sum of RM500,000 or to be assessed, together with interest and costs.

THE RESPONDENT'S AMENDED DEFENCE

[25] The respondent maintained that the termination of the contract was a mutual termination, that is, a decision arrived at the special meeting held on 3 August 2008 in the presence of the representatives of the appellant and the respondent.

[26] At the special meeting it was also agreed that the appellant would attend a joint inspection at the site together with the respondent on the 4 August 2008 to carry out a joint measurement of the work performed by the appellant.

[27] The respondent averred that at the said meeting the appellant had informed that the work done was quite minimal. This was pleaded in para 10(c) of the amended defence as '(i) Kerja kerja ukur dan pancang tanda ujian cerucuk, ii) Bon pelaksanaan dan insuran, iii) 1 muatan cerucuk dan iv) 1 unit kaki tapak'. Importantly, it was the respondent's case that piling works had not commenced.

[28] An assessment was carried out by the respondent's quantity surveyor (DW1) at the site on 4 September 2008 as arranged. However the assessment was done in the absence of the appellant as its representatives had failed to show up.

[29] The value of work done at the site was assessed by DW1 to be in the sum of RM70,575.45. A valuation report dated 10 September 2008 was prepared by the respondent.

[30] No claim was made against the respondent till a letter of demand dated 19 August 2011, that is, some three years later, was received from the appellant's solicitors.

[31] The respondent denied the appellant's claim for loss of profits in the sum of RM12,520,000 and the claim for wasted expenses in the sum of RM2,563,878.95, which included the claim of RM1,500,000 by the subcontractor. The respondent denied any knowledge of the appointment of the subcontractor by the appellant.

DECISION OF THE HIGH COURT

[32] After a full trial the learned High Court judge held that the termination of the contract was a mutual termination and that, save for the award of the sum of RM70,575.45 being a sum admitted by the respondent, the rest of the appellant's claim was dismissed with costs.

[33] Being dissatisfied with the decision, the appellant appealed to the Court of Appeal.

DECISION OF THE COURT OF APPEAL

[34] Upon reading the appeal record and the written submissions of counsel for the appellant and the respondent, and upon hearing fully the oral submissions of counsel, we, unanimously, held that the learned trial judge was in error when he decided that the termination was a mutual termination. We, therefore, reversed the decision of the High Court and held that the termination was made unilaterally by the respondent and accordingly it was a wrongful termination. We thus allowed the appeal, but against liability only. On quantum, we held that the appellant had failed to prove its losses as claimed and instead awarded the sum of RM100,000 only as nominal damages. In doing so, we recognised the fact that the appellant did suffer some damages as a result of the wrongful termination.

GROUNDS OF DECISION

[35] The crux of the decision was premised on the issue of whether the respondent was entitled to claim for the loss of profits in the sum of RM12,520,000 and wasted expenditure in the sum of RM2,563,878.95.

[36] As we had allowed the appeal against liability and there is no appeal filed by the respondent against that part of the decision, these grounds of judgment will only deal with the issue of quantum.

[37] The following issues are considered by this court, namely:

(1) whether the appellant was allowed under the terms of the contract to appoint a subcontractor to perform the entire scope of works under the contract;

(2) whether the respondent was informed of the appointment of HK Jaya Sdn Bhd as the subcontractor and had consented to it;

(3) whether the appellant's method of assessment to claim for the loss of profits was proper;

(4) whether the appellant is entitled to claim for wasted expenditure in the sum of RM2,563,878.95; and

(5) whether the appellant's claim should be based on quantum meruit as estimated by DW1.

Issue 1: Whether the appellant was allowed under the terms of the contract to appoint a subcontractor to perform the entire scope of works under the contract

[38] It was contended by counsel for the respondent that the appellant was in breach of cl 11 of the 'surat setuju terima tender' dated 22 February 2008, which provided that 'Tuan juga diingatkan supaya tidak menyerahkan hak, sub-sewa atau menjual projek kepada mana-mana pihak yang ketiga bagi melaksanakan keseluruhan projek ini', when the appellant decided to appoint HK Jaya Sdn Bhd as the subcontractor.

[39] It would be wholly unreasonable and against standard construction practice for any contractor to have to undertake the performance of its obligations without having the right to appoint subcontractor/s for the various parts of the works.

[40] However, and in any event, we are of the view that this point was really a non-issue as any alleged breach of cl 11 would only be an issue for consideration insofar as liability was concerned and not for the purpose of the assessment of quantum of damages.

[41] Having said that, we are, however, surprised to note that the entire scope of works under the contract was awarded to the subcontractor to perform. The appellant did not retain any part of the works for its own performance. The value of the contract at RM41,380,000 was not a paltry sum. On the contrary it was a huge contract at a colossal sum and the appellant had obviously been (pre) qualified to be a tenderer in the first place. But by having subcontracted the whole of the works to the subcontractor, the appellant was the contractor in name only and can be regarded as a nominee contractor. There, certainly, was no privity of contract between the respondent

and the subcontractor. While it may not have been an assignment in the formal sense, the subcontract surely took on the cloak of an assignment. A

[42] To the court, it was clear as day that the appellant's role in the contract to enable it to make its profit was to obtain the contract from the respondent on the one hand and then to award the entire scope of works to the subcontractor on the other. B

[43] A perusal of the letter of acceptance of the subcontractor dated 12 March 2008 will show that the entire responsibility for the construction of the works laid on the shoulders of the subcontractor. There was nothing to suggest that the appellant retained any residual responsibility of the works to the respondent. C

[44] Notwithstanding our observations above, we are of the view that the appointment of the subcontractor was not in breach of cl 11 as it was neither 'an assignment, sub-lease nor sale of the Works to a third party'. It was a subcontract notwithstanding that it was a subcontract for the performance of the entire scope of works awarded to the appellant as the contractor. D

Issue 2: Whether the respondent was informed of the appointment of HK Java Sdn Bhd as the subcontractor and had consented to it E

[45] The short answer to this issue is that the appellant had appointed the subcontractor without the knowledge and consent of the respondent. F

[46] It will be noted that the subcontractor was awarded the subcontract just some 18 days after the tender of the appellant had been accepted. One really wonders whether the subcontractor could have had sufficient time to study the terms of the tender award and to prepare its quotation for the entire scope of the works to be submitted to the appellant. A contract of this magnitude would normally take weeks if not months for any responsible subcontractor to prepare its quotation to the contractor and importantly, to be able to marshal its finances and mobilise its workforce, plant and machinery to commence work. Commencement of work in this case had originally been scheduled for 7 March 2008, which incidentally was a date even before the subcontractor had been appointed on 12 March 2008. G H

Issue 3: Whether the appellant's method of assessment to claim for the loss of profits was proper I

[47] It is obvious that the appellant's method of calculation or assessment of the loss of profits was on a 'straight line basis', that is, taking the cost of the contract awarded by the respondent at RM41,380,000 and then merely

deducting the cost of the subcontract awarded to the subcontractor at RM28,860,000 thereby giving the appellant a clean profit of RM12,520,000. By any standard this would have been a phenomenal profit considering that there would have been no value added to the works by the appellant and that the contract was scheduled to be completed within a short span of 96 weeks only from the date of possession of site.

[48] A profit of RM12,520,000 would have given the appellant a profit calculated at the rate of 30.26 per centum over a period of less than two years. And this too for doing nothing save for obtaining the contract from the respondent and then awarding it wholesale to the subcontractor.

[49] We are not convinced on a balance of probabilities that the profit to be earned by the appellant could have been so huge in the circumstances.

[50] We are also not persuaded that the subcontract price was a proper price at which the subcontractor could have completed the works and made its own profits as well.

[51] The appellant did not take any steps at the trial to call the relevant witnesses to prove to the trial court that a profit at 30.26 per centum for a contract of this nature was usual or normal to be achieved in the construction industry.

[52] We are mindful of the reliance placed by counsel for the appellant on the Federal Court case of *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697 where it was held that 'where the owner himself breaches the contract, before any work has been done, the measure of damages is the agreed amount less the cost of building, or repairs or improvements'.

[53] It would appear that the dicta of the Federal Court in *Akitek Tenggara* formed the basis of the method of calculation by the appellant in support of its claim for the loss of profits.

[54] However, this method of calculation cannot be adopted where the work has begun. And this is what the Federal Court said in *Akitek Tenggara*, that where 'there is a breach of contract after the work has begun (it would) present difficulties. The ordinary measure of damages is that part of the contracted amount which remains unpaid less the estimated cost of completing the job'. In the present case, there was no dispute that the subcontractor had in fact commenced work on site although not much progress had been achieved by the time the temporary stop work notice followed by the final stop work notice were issued. Although the amount of work done was an issue discussed at the special meeting held on 3 September 2008 between the appellant and the

respondent, regrettably no evidence was adduced at all by the appellant during the trial to prove the estimated cost for completing the job.

[55] Counsel for the appellant had submitted that at the time of termination, the appellant had not even submitted its first claim to the respondent and, likewise, the respondent had not paid anything to the appellant under the contract and so for all intents and purposes 'the profit of the entire contract can be used to calculate the loss of profit as it forms the totality of the balance of the Work'. While this point of submission was quite ingenious, it cannot be detracted from the fact that the subcontractor had started and done some work. The fact that the appellant had not submitted any claim for payment does not mean that the appellant can claim against the respondent as if the works had not begun at all.

[56] With respect, we are of the view that the appellant had failed to prove on a balance of probabilities the part of the contracted sum which remained unpaid and the estimated cost of completing the job. No evidence was adduced to prove these sums adequately.

[57] A claim for damages for breach of contract is governed by s 74 of the Contracts Act 1950. It was held by Rohana Yusuf J (now JCA) in the case of *Tahan Steel Corporation Sdn Bhd v Bank Islam Malaysia Bhd* [2011] 1 CLJ 755 that 'under s 74 of the Contracts Act 1950, the damages entitled to be claimed by the plaintiff must be foreseeable loss which naturally arose from the breach by the defendant or which the parties at the time making the contract know to be the likely result of the breach'. It is trite that any claim for loss and damage must be foreseeable. In this case it cannot be disputed that the claim by the appellant for the loss of profits was foreseeable and not too remote. It was wholly foreseeable that when the respondent decided to unilaterally terminate the contract, the appellant would be put to loss and expense. But then that was not the issue to be decided by this court.

[58] The issue as we see it was not whether the loss of profits was foreseeable but rather what was the quantum of that loss. It is trite and settled law that where a plaintiff brings an action for damages, he must prove the actual damages or the reasonable compensation for it in accordance with the settled principles in *Hadley and another v Baxendale and others* (1854) 9 Exch 341; [1843–60] All ER Rep 461. And before he can recover the damages he has to discharge the burden of proving both the fact of damage and the amount of damage. Any failure to prove such damages will result in the refusal of the court to award such damages (see *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 (FC)). And in the judgment of the Federal Court in the case of *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 at p 100 His Lordship Ong Hock Thye FJ had this to say:

A The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of B nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed), para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p 178:

> C Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the Court, saying, 'This is what I have lost: I ask you to give me these damages'. They have to prove it.

D **[59]** If the party seeking damages proves neither the fact nor the amount of damages the action will fail or he may be awarded nominal damages only upon proof of some damage (see *Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229; [2012] AMEJ 0030 (CA); *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ E 360; [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; *Guan Soon Tin Mining Co v Ampang Estate Ltd* [1973] 1 MLJ 25 and *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 AMR 41).

[60] The appellant seemed to be claiming only for the 'construction element' F of the works subcontracted to the subcontractor at the subcontract price of RM26,860,000. If the subcontract price of RM26,860,000 was for the entire scope of works and yet as described by the appellant, it was for the 'construction element' then the irresistible question that needs to be answered was whether there were 'other elements' and if so what was the cost of those other or balance G elements in the scope of works undertaken. If indeed there were any other costs involved, these were not revealed to the court. The 'other costs' would most certainly have increased the cost of the entire scope of works undertaken by the subcontractor and thereby reducing the quantum of loss of profits suffered by the appellant.

H

Issue 4: Whether the appellant was entitled to claim the sum of RM2,563,878.95 in full or part thereof as wasted expenditure

I **[61]** The appellant claimed for the sum of RM2,563,878.95 being the cost of wasted expenditure as well. This sum included the sum of RM1,500,000 claimed by the subcontractor as the construction cost.

[62] It is also trite that in the event of a breach of contract by a defaulting party, the claimant may either claim for his loss of profits or for his wasted expenditure. However, the claimant must elect either of them and cannot claim for both. In *Anglia Television Ltd v Reed* [1971] 3 All ER 690, Lord Denning MR in his judgment said:

> ... It seems to me that a plaintiff in such a case as this had an election: he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits — or if he cannot prove what his profits would have been — he can claim in the alternative the expenditure which has been thrown away, that is, wasted by reason of the breach. That is shown by *Cullinane v British 'Rema' Manufacturing Co Ltd* [1953] 2 All ER 126112641265; [1954] 1 QB 292, at 303, 308.

[63] The above passage was followed with approval in *Ismail v Haji Taib* [1972] 1 MLJ 259 (FC) (per Suffian FJ, as he then was) and recently in the Court of Appeal decision in *National Land Finance Co-Operative Society Ltd v Westingmont Holdings Sdn Bhd* [2014] 1 AMCR 485 at p 499 (see also the Court of Appeal decision in *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411; [2004] 1 AMR 81).

[64] Reading the amended statement of claim and considering the appellant's case as a whole, we are of the view that, with respect, the appellant had wholly failed to elect to claim for either the loss of profits or for wasted expenditure only. On the contrary, it will be recalled that the thrust of the appellant's claim was not only to claim for the loss of profits but also for the cost of wasted expenditure as well. By its own pleading, the appellant in para 16 of the statement of claim had prayed for:

> a) Jumlah RM12,520,000.00;
>
> b) Jumlah RM2,563,878.95.

[65] It is abundantly clear that the appellant is claiming for the sum of RM12,520,000 being loss of profits and the sum of RM2,563,878.95 being wasted expenditure together. Prayer (a) was in addition to prayer (b) and was not to be read disjunctively. Unlike prayer (c) 'Selanjutnya dan/atau sebagai alternative, kerosakan untuk dinilaikan;' which was a further and/or alternative prayer to prayers (a) and (b), the impugned prayers (a) and (b) were not meant to be taken as an alternative to each other.

[66] Without an election being made by the appellant, it did not behove the court to consider the appellant's claim as a claim for loss of profits only while excluding the claim for wasted expenditure or vice versa to consider the appellant's claim as a claim for wasted expenditure only while excluding the claim for loss of profits. As the law requires the appellant to make an election

and as the appellant had failed to do, this in our view had rendered the appellant's claim uncertain to say the least. It was not for the court to make an election on behalf of the appellant.

[67] In any event and for completeness we note, upon a perusal of the evidence of the appellant's witness, Clement Wong ('PW6') given at trial, that the purported claims of the subcontractor and other subcontractors had not even been verified and approved by the appellant itself. Without such verification by the appellant and without the submission of the purported claims to the respondent before the letter of demand was issued, we do not think the respondent can be faulted for not agreeing to pay the sum of RM2,563,878.95 or any part of it to the appellant. We are therefore of the view that it will not be necessary to evaluate each and every claim put forward by the appellant in its claim for wasted expenditure.

Issue 5: Whether the appellant's claim should be based on quantum meruit as estimated by DW1

[68] This court accepted the evidence of the witness for the respondent that it was discussed between the appellant and the respondent at the special meeting on 3 September 2008 that a joint inspection would be carried out at the site on the very next day. The inspection and measurement at site was carried out by DW1 in the absence of the appellant as its representatives had failed to show up as arranged.

[69] DW1, the quantity surveyor of the appellant, estimated the value of work done, including the prorated cost of the performance bond and premium paid for the contractors' all risk and workmen's compensation insurance policies to be in the sum of RM70,575.45. Importantly, it was noted by DW1 that piling works had not begun although some piles had been delivered to site. The learned trial judge, notwithstanding his finding that the termination was mutual, had awarded the said sum to the appellant.

[70] In the absence of proof of damages by the appellant, this court is of the view that the sum of RM70,575.45 correctly represents the value of work done by the subcontractor, measured on a quantum meruit basis.

[71] As the appellant had failed to elect to claim either for loss of profits or for wasted expenditure only, and the claim being bad for uncertainty in the circumstances, we decided to award the sum of RM100,000 which sum included the sum of RM70,575.45 assessed by DW1, as nominal damages to the appellant. This is on the basis that this court recognises the fact that the appellant did suffer some loss as a result of the wrongful termination.

[72] As for nominal damages they are said to be 'a sum of money that may be spoken of, but that has no existence in point of quantity' as held by Maule J in *Beaumont v Greathead* (1846) 2 CB 494 at 499.

[73] A token sum is usually awarded for nominal damages and the amount could be small or miniscule. Just like sixpence in *Feize v Thompson* (1808) 1 Taunt 121; a farthing in *Mostyn v Coles* (1862) 7 H & N 872 and a shilling in *Sapwell v Bass* [1910] 2 KB 486.

[74] Undoubtedly, the cases cited above were decided in England in yester years. However, today it is not uncommon for nominal damages to be awarded in Malaysia in the thousands of ringgit, depending of course on the circumstances of the case. And in the case of *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 2 MLJ 314 (CA), my learned brother Justice Mohd Hishamudin had occasion to say that the learned trial Judge was correct in awarding nominal damages of RM50,000 in the circumstances of that case.

[75] Where it is clear that the appellant had failed to furnish credible evidence to prove the amount of damages it claimed to have suffered but where it is equally clear that the appellant did suffer some loss and damage, then it will be an appropriate case for the court to award nominal general damages (see *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17 per Thompson CJ).

CONCLUSION

[76] In the result, the court held that while the unilateral termination of the contract by the respondent was unlawful, the quantum of damages awarded to the appellant would only be in the sum of RM100,000 as nominal damages as the appellant had failed to prove its loss of profits or the wasted expenditure. We also award interest at the rate of 5%pa on the said sum, the interest to run from 24 September 2008 (ie the date the cause of action arose) until date of realisation.

[77] Costs in the sum of RM30,000 here and below were awarded to the respondent. The deposit to be refunded.

Order accordingly.

Reported by Afiq Mohamad Noor